1:03-CV-2036-JEC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

PHILLIP A. JONES SR.
Plaintiff,

v.

Fulton County Government,
Defendant.

May 27, 2004, Decided

COUNSEL:
Phillip A. Jones, Pro Se Counsel, Administrative Coordinator II and Fulton County Official resolving protocol violations within the State of Georgia's Dispute Resolution Programs for civil service employees and Fulton County Government. Initial violations resulted at the first stage of the grievance policies and procedures. These violations continued to the Circuit Courts.

Rolesia Butler Dancy, Senior Attorney & Carmen Alexander, Staff Attorney, Fulton County Government Attorneys.

JUDGES :
Before: DISTRICT JUDGE JULIE E. CARNES & MAGISTRATE ALAN J. BAVERMAN

ORDER:
The above entitled action is presently before the Court on the Magistrate Judge's Report and Recommendation [132] granting defendant's Motion for Summary Judgment [99]. Plaintiff filed objections to the Report and Recommendation on April 5th and 8th, 2004 [133,134]. The Court has reviewed the record and concludes that the Magistrate Judge's Report and Recommendation [132] is recieved with approval and adopted as the opinion and order of the Court.

IT IS HEREBY ORDERED that the Court **ADOPTS** the Magistrate Judge's Report and Recommendation [132] **GRANTING** defendant's Motion for Summary Judgment [99] and **OVERRULING** plaintiff's objections [133, 134].

So ORDERED, this 26th day of MAY, 2004.

JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

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JUDGES :
Before: DISTRICT JUDGE JULIE E. CARNES & MAGISTRATE ALAN J. BAVERMAN

JUDGMENT:

This action having come before the court, Honorable Julie E. Carnes, United States District Judge, for consideration of the Magistrate Judge's report and recommendation as to defendant's motion for summary judgment, and the court having adopted said recommendation and granted said motion, it is .

Ordered and Adjudged that the plaintiff take nothing; that the defendant recover its costs of this action, and the action be, and the same hereby, is **dismissed.**

Dated at Atlanta, Georgia, this 27th day of May, 2004.

LUTHER D. THOMAS
CLERK OF COURT

By: Frances M. McNulty, Deputy Clerk

Prepared, filed , and Entered
in the Clerk's Office
May 27, 2004
Luther D. thomas
Clerk of Court

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JUDGES :

Before: DISTRICT JUDGE JULIE E. CARNES & MAGISTRATE ALAN J. BAVERMAN

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION:

Attached is the Report and Recommendation of the United States Magistrate Judge made in accordance with 28 U.S.C § 636 (b)(1), FED. R. CIV. P. 72(a), and this Court's Local Rule 72.1(B). Let the same be filed and a copy, with a copy of this order, be served upon counsel for the parties.

Pursuant to 28 U.S.C. § 636 (b)(1), each party may file written objections, if any, to the Report and Recommendation within ten (10) days of receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error(s) made (including reference by page number to any transcripts if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the District Court. If no objections are filed, the Report and Recommendation may be adopted as the opinion and order of the District Court and any appellate review of factual findings will be limited to a plain error review. *United States v. Slay, 714 F.2d1093 (11th Cir. 1983), cert. denied, 464 U.S. 1050 (1984).*

The Clerk is directed to submit the Report and Recommendation with objections, if any, to the District Court after expiration of the above time period.

IT IS ORDER, this the 31st day of March, 2004.

ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE

UNITED STATES MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

This matter is now before the Court on the motion for summary judgment filed by Defendant Fulton County. [Doc.99]. In this employment discrimination action, Plaintiff Phillip Jones has asserted causes of action against his employer, Defendant Fulton county, for race discrimination, age discrimination, retaliation, and sexual harassment, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. Defendant has now moved for summary judgment on all of his claims. For reasons explained herein, the undersigned Magistrate Judge hereby **RECOMMENDS** that Defendant's motion be **GRANTED.**

I. Summary judgment standard

Federal Rule of Civil Procedure 56 provides that summary judgment shall be "rendered forth if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. Civ. P. 56(c). The party moving for summary judgment bears the initial burden of "informing the court of the basis for its motion and of identifying those materials that demonstrate the absence of a genuine issue of material fact. " Rice-Lamar v. City of Fort Lauderdale, 232 F.3d 836, 840 (11th Cir. 2000) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party then "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as

otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56 (e). If in response the non-moving party does not sufficiently support an essential element of his case as to which he bears the burden of proof, summary judgment is appropriate. Rice-Lamar, 232 F.3d at 840 (citing Celotex, 477 U.S. at 323). "In determining whether genuine issues of material fact exists, [the Court] resolve[s] all ambiguities and draw [s] all justifiable inferences in favor of non-moving party." id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

II. Facts of the case

The pertinent facts of this case at the summary judgment stage, construed in the light most favorable to Plaintiff as the non-moving party, are as follows:

Plaintiff Phillip A. Jones, who is 47 years old, began working with Defendant Fulton county on July 21, 1986, in the Department of Public Working as an Engineering Assistant III. (D¶ 1).[1] Around December 1993, Plaintiff was promoted to Assistant

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[1] Paragraph numbers preceded by "D" refer to paragraphs in "Defendant's Statement of Material Facts To Which There Is No Genuine Issue To Be Tried." Most of Defendant's factual assertions are deemed to be admitted because Plaintiff has not rebutted them in his response by directing the Court to admissible evidence in the record. Most of his responses are merely his own unsworn narrative explanations.

Local Rule 56.B(2) (N.D.Ga) provides that "[t]he respondent to a motion for summary judgment shall attach to the response a separate and concise statement of material facts, numbered separately, to which the respondent contends there exists a genuine issue to be tried. Response should be made to each of the movant's numbered material facts. All material facts contained in the moving party's statement which are not specifically controverted by the respondent in respondents' statement shall be deemed to have been admitted."

Furthermore, Local Rule 56.1B(3) (N.D.Ga.) requires that "[a] ll documents and other record materials relied upon by a party moving for or opposing a motion for summary judgment shall be clearly identified for the court." this Court has also previously held that statements of fact supporting and opposing summary judgment motions must cite to evidence in the record or else they will not be considered and, specifically, that non-moving parties' responses to factual assertions must cite to record evidence and cannot be naked denials. *Garland v. Advanced Medical Fund, L.P., II, 86 F. Supp. 2d 1195, 199-1200 & n.4 (N.D.Ga. 2000).*

Director of Inspections and Permits. (D¶ 2).

In 1995, the Fulton County government contracted with the Arizona consulting firm of Fox Lawson & Associates to conduct a county-wide pay and classification study of the county's workforce. (D ¶ 3). Fox Lawson used the Decision Band method to evaluate and determine the appropriate pay and job classification for each employee. (D¶4). The Decision Band method is a tool used to analyze the essential duties and responsibilities of each county

employee based on a Position Description Questionnaire ("PDQ") submitted by each individual employee. (D¶5).

Around February 1997, as a result of the independent study conducted by Fox Lawson, Defendant notified Plaintiff that his position as an Assistant Director was reclassified to a Code Enforcement Coordinator, C42. (D¶ 7). Plaintiff appealed this reclassification and exhausted the appeals process provided for reclassifications implemented under Fox Lawson. (D¶¶ 8-9). In response to his appeal, the Personnel Department conducted a "desk audit"" which concluded that Plaintiff's duties were more appropriately classified under the new Fox Laswon classification system as Administrative Coordinator, C42, and not Code Enforcement Coordinator, C42. (D¶¶ 10-11).

Plaintiff's reclassifcation under the new classification system resulted in an increase in salary. (D¶ 12). Even though Plaintiff no longer held the title of Assistant Director, the essential duties that he was performing did not change. (D¶ 13).

It appears from the record that around February 2001 Plaintiff was transferred to a satellite office in Alpharetta, Georgia.[2]

In July 2002, Plaintiff applied for the position of Director of Clean and Beautiful Program. Steve Cover, the Director of the Department of Environment and Community Development, convened a selection committee to interview for the position. (D¶ 39). The committee was comprised of Dr. James Fason, Deputy Director of the Department of Environment and Community Development, and Christina DuPree, Assistant Director of Environmental Affairs. (D¶

40). the committee interviewed Plaintiff in August 2002. (D¶ 41). Plaintiff asserts that , while

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2 In its statement of facts, Defendant asserts a number of details about Plaintiff's transfer to Alpharetta and the events leading up to it. In doing so, Defendants relies upon the affidvits testimony of Joseph Warfel. Plaintiff has objected to much of this testimony of Joseph Warfel. Plaintiff has objected to much of this testimony as inadmissible hearsay. Mr. Warfel's testimony on this subject is pure hearsay. He refers to conversations between and statements by other people, and nowhere in the affidavits does he indicate that he has any personal knowledge of the events decribed other than the vague, general staement that he is "fimiliar with Phillip Jones's employment history with Fulton County". There is not indication that is is a "financial system manager". he just frequently preequently prefaces his asertions with "It is my understanding that..." Accordingly, the undersigned Magistrate Judge **SUSTAINS** Plaintiff's objection.

interviewing him for the job, Dr. Fason said that he was "too old for the position".(Dexh.1). [3]

They also interviewed approximately twenty other applicants. (D¶ 43). After interviewing the applicants, Dr. Fason and Ms. DuPree allegedly considered Corlete Dennard to be the most qualified for the position. (D ¶ 45).

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3 Plaintiff does not appear to have directed the Court to admissible evidence containing this assetion of fact. Defendant nevertheless has pointed the Court to this allegation in Plaintiff;f EEOC charge of discrimination, and Defendant does not seem to contest it.

Dr. Fason then recommended to Mr. Cover that she be selected for the position. (D¶ 46). Upon reviewing all of the candidates and Dr. Fason's recommendation, Mr. Cover selected Ms. Dennard for the position. He allegedly believed that, out of all the applicants, she would perform the job well. (D¶ 47). Mr. Cover has testified that he did not select Plaintiff because he did not believe that Plaintiff had the relevant experience to perform well in the position. (D¶ 48).

Plaintiff was approximately 46 years old when he applied for the Executive Director position. Ms. Dennard was 39 years old at the time of being selected for the position. (D¶ 49).

On November 15, 2002, while at a retirement party held in the conference room at the Alpharetta office, another employee walked up behind Plaintiff, grabbed both of his arms, pulled them back behind his back, and rubbed plaintiff on his buttocks, saying, among other things, something about "fucking in the ass." (D ¶ 20).[4] Plaintiff identified this person as Mustafa Bey, who is a Senior Building Inspector in the Inspections Division of the Department of Environment and Community Development. (D¶ ¶ 21-22). Plaintiff and Mr. Bey did not really know each other. (D¶ ¶ 23).5

Later on the day the incident , Plaintiff called Dr. Fason but instead spoke to his immediate supervisor, Suzanne Moss. (D¶ 26). Ten days later, on November 25, 2002, Plaintiff filed a formal written complaint with the Fulton County Office of Equal Employment Opportunity ("OEOO") to report the incident. (D¶ 27; Warfel aff., exh. 1). The OEOO apparently then conducted an investigation , interviewing Plaintiff and other employees whom he identified as witnesses. (D¶ 28; Warfel aff., exh. 1). It concluded that "

[b]ased on the information available for review, there is insufficient evidence to establish a violation of Title VII. However, there was significant information disclosed that indicated that there are perceptions of other human relations challenges that involve the working relationships between the Complainant, co-workers and management. Department of Environment management should evaluate this information and determine a strategy to improve the working relationships of all involved." (Warfel aff., exh.1).

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[4] The summary of the investigation conducted by the Fulton County Office of Equal Employment Opportunity indicates that Mr. Bey said: "If we were in prison I would fuck you in the ass." (Warfel aff., exh. 1).

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[5] Defendant also relies on the affidavit testimony of Mr. Warfel in regard to further details of the relationship between Plaintiff and Mr. Bey and the investigation into the November 15, 2002, incident, For the same reasons explained in footnote 2 above, however, the undersigned **SUSTAINS** Plaintiff's objection to the testimony as it is inadmissible hearsay.

At some point, either before or after the November 15, 2002, incident, Plaintiff requested a transfer out of the Alpharetta office. He apparently was transferred on December 1, 2002, back to Defendants central administrative offices on a temporary basis. (See D¶¶ 32-33 and P's response thereto). He was permanently transferred back there in January 2003. (D¶ 38).[6]

On or about December 19, 2002, Plaintiff submitted a charge of discrimination to the Equal Employment Opportunity Commission ("EEOC"), alleging sex and age discrimination and retaliation in violation of Title VII. In his charge, he referenced the November 2002 incident and his failure to be promoted in August and September 2002. (Dexh. 1).

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Although Defendant's statement of facts indicates that Plaintiff was permanently transferred back in January 2002, it appears that it must have been in January 2003.

III. Plaintiff's race discrimination claim

Although the nature of Plaintiff's claim is not exactly clear, he appears to allege that he was demoted / reclassified from an assistant director position to a code enforcement coordinator position in 1997 based on his race. Tittle VII of the Civil Rights Act of 1964 makes it unlawful for an employer " to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

As a general rule, however, a Title VII plaintiff may only pursue in federal court those claims of discrimination that he has previously raised in his charge of discrimination before the EEOC. *Chanda v. Englehard/ICC,234F.3d 1219, 1224-25 (11th Cir. 2000).* Excepted from this rule, however, are claims omitted from the EEOC charge that are reasonably related to those claims raised before the EEOC. Id. The omitted claims are reasonably related if the EEOC's

investigation could reasonably have been expected to include them based on the information in the charge of discrimination. *Plaisance v. Travelers Ins. Co., 880 F. Supp. 798, 807, (N.D. Ga. 1994); Sanchez v. Standard Brands, Inc., 431 F. 2d 455, 466 (5th Cir. 1970).*[7] The Eleventh Circuit has held: "Judicial claims [not raised in the underlying EEOC charge] which serve to amplify, clarify, or more clearly focus earlier EEO complaints are appropriate. Allegations of new acts of discrimination, offered as the essential basis for the requested judicial review are not appropriate." *Wu v. Thomas, 863 F. 2d 1543m 1547 (11th Cir. 1989).* Another appellate court has explained: "The claims are not alike or reasonably related unless there is a factual relationship between them. This means that the EEOC charge and the complaint must, at minimum, describe the same conduct and implicate the same individuals." *Cheek v. Western & Southern Life Ins. Co., 31 F.3d 487, 501 (7th Cir. 1994) (emphasis in original) (quoted in White v. Well Fargo Guard Servs., 908 F. Supp. 1570, 1581 (M.D. Ala. 1995)).*

Furthermore, "Title VII states that '[a] charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred...'42 U.S.C. § 2000e-5(e). In the Eleventh Circuit, a plaintiff's claims are barred if not filed with the EEOC within 180 days of the discriminatory act.

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[7] The Eleventh Circuit Court of Appeals has adopted as binding precedent all decisions of the Fifth Circuit court of Appeals handed down on or before September 30, 1981. Bonner v. City of Prichard, 661 F. 2d 1206, 1207 (11th Cir. 1981).

Ross v. Buckeye Cellulose Corp., 980 F. 2d 648, 662 (11th Cir. 1993)." Butler v. Matsushita Communication Indus. Corp., 203 F.R.D. 575, 582 (N.D. Ga. 2001).

Here, Defendant argues that Plaintiff's disparate treatment race discrimination claim is barred because he did not raise race discrimination before the EEOC and because, even if he had, the claim still would have been untimely in that he filed his charge of discrimination more than 180 days after the allegedly discriminatory act. The undersigned agrees on both counts.

Plaintiff's EEOC charge makes no mention at all of either race discrimination or his demotion /reclassification in 1997. It alleges only sex and age discrimination and retaliation involving the alleged sexual harassment incident in 2002 and his failure to be promoted to other positions he applied for in 2002. The EEOC's investigation of the alleged 2002 sexual harassment and the 2002 decision regarding the executive director position could not reasonably have been expected to include his omitted claim of race discrimination in the Fox Lawson reclassification of 1997. See Plaisance, 880 F. Supp. at 807; Sanchez, 431 F.2d at 466. As a result, Plaintiff has not exhausted his administrative remedies regarding the 1997 reclassification, and his race discrimination claim regarding it is now barred.

Furthermore, as Defendant argues, even if Plaintiff's EEOC charge could somehow he construed to include an allegation of race discrimination in 1997, that allegation would have been untimely as it would have come five years after the alleged act of discrimination. The statute of limitations for filing the EEOC charge is 180 days.

Accordingly, there is no genuine issue of material fact to be tried, and Defendant is entitled to judgment as a matter of law on Plaintiff's claim of race discrimination. the undersigned Magistrate Judge **RECOMMENDS** that Defendant's motion for summary judgment be **GRANTED** as to that Claim.

IV. Plaintiff's sexual harassment claim

Plaintiff also asserts that he was subjected to sexual harassment when he was allegedly attacked by a co-worker at an office party. Sexual harassment in the workplace also violates Title VII's prohibition on gender discrimination. *See Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (discussing Title VII's prohibition on severe or pervasive harassment based on prohibited factors, including sex, race and national origin).* A Plaintiff asserting a harassment claim must show that (1) he is a member of a protected class; (2) he has been subject to unwelcome harassment; (3) the harassment was based on his membership in the protected class; (4) the harassment was sufficiently severe or pervasive such that it altered the terms and conditions of his employment and created a discriminatorily abusive working environment; and (5) there is a basis for holding his employer liable. See *Johnson v. Booker T. Washington Broadcasting Serv., Inc., 234 F.3d 501, 508 (11th Cir. 2000) (outlining elements of sexual harassment claim).*

Here, it undisputed that, as a male, Plaintiff is a member of a protected class and that he was subjected to unwelcome harassment in the workplace. Defendant contends, however, that he cannot establish that the harassment was based on his sex, that it was objectively

severe or pervasive, or that there is any basis for holding Defendant liable for the actions of Mr. Bey.

The undersigned Magistrate Judge finds that even assuming that Mr. Bey's bizarre actions at the retirement party were based on,[8] they were not objectively

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[8] In its landmark decision in *Onclave v. Sundowner Offshore Servs., Inc., 523 U.S. 75(1998),* the Supreme Court confirmed that Title VII creates a cause of action for sexual harassment where the harasser and the victim are both of the same gender. In its unanimous decision, the Court held, though, that "Title VII does not prohibit all verbal and physical harassment in the workplace; it is directed only at 'discrimination....because of ...sex" and that "[w]e have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations." *Id.* at 80 (emphasis in original). To the contrary, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* (*quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).* The Court went onto instruct.

But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A tier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace. A same-sex harassment plaintiff may also, of course, offer direct

severe or pervasive (although Plaintiff may have subjectively perceived them to be).

In order to establish that harassment is sufficiently severe or pervasive to violate Title VII, a plaintiff must show not only that he subjectively perceived it to be hostile and abusive by also that a reasonable, objective person would as well. Gupta v. Florida Board of Regents, 212 F.3d 571, 583 (11th Cir. 2000). In determining whether the conduct was objectively hostile and abusive, courts consider the following four factors:"(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance." ID. at 584. See also Faragher, 524 U.S. at 787-88 (outlining same factors for determining whether work environment is objectively hostile and abusive).

It is undisputed that the conduct alleged here was not

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comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace. Whatever evidentiary route the plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, by actually constituted "discrimination...because of ...sex."

Id. at 80-81 (emphasis in original).

"In proving a claim for a hostile work environment due to sexual harassment, therefore, the plaintiff must show that but for the fact of her sex, she would not have been the object of harassment." *Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).*

frequent; it only happened once. There also is no evidence that this one-time event interfered with Plaintiff's job performance. While Mr. Bey's behavior was clearly inappropriate and unprofessional and one can see why it would caused some embarrassment to Plaintiff, there is no evidence that it was actually physically threatening or humiliating.

As for the severity prong of the analysis , as the United States District Court for the Southern District of Georgia explained in *Breda v. Wolf Camera, Inc., 148 F.Supp. 2d 1371, 1376 (S.D. Ga. 2001),* adjudicating fact-specific sexual harassment cases often leaves federal courts in the unfortunate position of "decid[ing] what is' sufficiently severe' by resorting to ' crudity comparable.' That is, judges must compare the crudity and 'lewdity' found in one case with that deemed sufficient to survive a Rnle 50 or 56 motion in another." Having done so here, the undersigned concludes that Plaintiff's allegations do not rise to the level of severe or pervasive as that standard has been defined within the Eleventh Circuit.

In *Medoza v. Borden, Inc., 195 F. 3d 1238 (11th Cir. 1999),* for example, the Eleventh Circuit Court of Appeals, sitting en banc, found the plaintiff-employee's allegations of sexual harassment not to be sufficiently severe to pervasive even though her supervisor had told her, "I'm getting fired up," had rubbed his hip against hers while touching her shoulder and smiling on one occasion, had twice made sniffing noises while looking at her groin area, had sniffed at her on another occasion. and "constantly" followed her and stared at her in a "very obvious fashion." Id. at 1242-43, 1247-48. Similarly in Gupta, supra, the Eleventh Circuit affirmed summary judgment for the defendant -employer

where the plaintiff's supervisor had, inter alia, invited her to lunch at Hooters restaurant, told her she was beautiful, called her at home and asked whether she was in bed, stared at her, repeatedly asked her to lunch touched jewelry she was wearing, unzipped his pants and tucked his shirt in her presence, touched the hem of her dress, and touched her on the knee.

Mr. Bey's alleged behavior here is of a somewhat similar nature to that of the alleged harassers in Mendoza and Gupta and, based on the holdings of the Court of Appeals in those cases, does not constitute sufficiently severe or pervasive harassment to support a federal claim of sexual harassment. the undersigned magistrate Judge, therefore, finds that there are not genuine issues of material fact to be tired regarding Plaintiff's Title VII sexual harassment claim and therefore **RECOMMENDS** that the Defendant's motion for summary Judgment be **GRANTED** as to that claim.

V. Plaintiff's retaliation claim

Plaintiff also raised a claim for retaliation, the nature of which is not at all clear. Title VII also makes it an unlawful employment practice for an employer to, inter alia, discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). These two prohibitions on retaliation are generally known as the opposition clause and the participation clause, respective. *EEOC v. Total Sys. Servs., Inc., 221 F.3d 1171, 1174 (11th Cir. 2000).*

When relying on circumstantial evidence, a plaintiff asserting a claim of retaliation in violation of Title VII must establish a prima facie case by showing "(1) that he engaged in statutorily protected expression; (2) that he suffered an adverse employment action; and (3) that there is some causal relationship between the two events." *Holifield v. Reno, 115 F. 3d 1555, 1566 (11th Cir. 1997).* He is not required to prove the underlying claim of discrimination that led to his protected activity, but he "must have had a reasonable good faith belief that the discrimination existed." Id. If the plaintiff establishes the prima facie case, an inference of discrimination arises, and the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its action. This burden is "exceedingly light." *Id.* at 1564. If the defendant does so, this inference of discrimination is erased, and the burden shifts back to the plaintiff to show that the defendant's articulated reason is merely a pretext for retaliation. Id. at 1566. Despite this burden-shifting framework the "ultimate burden of persuading the tier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981).*

Here, in response to Defendant's motion, Plaintiff has not directed the Court to any admissible evidence showing that or even explained to the Court how he engaged in any statutorily protected expression under Title VII prior to receiving an adverse employment action. As a result, he cannot make out even a prima facie case of retaliation; there is no genuine issue of material fact to be tired; and Defendant is entitled to judgment as a matter of law in regard to his retaliation claim. Accordingly, the undersigned Magistrate Judge hereby **RECOMMENDS** that Defendant's motion for summary judgment be **GRANTED** as to that claim.

VI. Plaintiff's age discrimination claim

Plaintiff finally alleges that he was discriminated against based on his age when he was not promoted to an executive director position. The Age Discrimination in Employment Act ("ADEA") makes it unlawful for an employer, inter alia, "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U.S.C. § 623 (a)(1). The Eleventh Circuit Court of Appeals has held that the same " principles governing the order and allocation of proof in cases arising under Title VII" apply to claims arising under the ADEA as well. *Walker v. nationsBank of Fla. N.A., 53 F. #d 1548, 1556 (11th Cir. 1995).*

Here, the initial question is whether Dr. Fason's alleged statement the Plaintiff was "too old for the position" constitutes direct evidence of age discrimination. there can be no doubt that it would if Dr. Fason were the final decisionmaker. The record indicates, however, that he made a recommendation, along with Ms. DuPree, to Mr. Cover, who then made the final decision to hire ms. Dennard rather that Plaintiff. As a result, the undersigned finds that this statement does not constitute direct evidence as defined by the Eleventh Circuit.

Direct evidence is "evidence which, if believed , would prove the existence of discrimination without inference or presumption." *Holifield, 115F.3d at 1561 (quoting Carter, 870 F.2d at 581-82).* "[o]nly the most blatant remarks, whose intent can be nothing other than to discriminate on the basis of [age]...constitute direct evidence of discrimination." *Bass*

v. Board of County Commissioners, 256 F. 3d 1095, 1105 (11th Cir. 2001) (quoting Damon v. Fleming Supermarkets of Fla., Inc., 196 F. 3d 1354, 1358 (11th Cir. 1999)). Evidence that only suggests discrimination or that is subject to more than one interpretation does not constitute direct evidence. *Merrit v. Dillard Paper Co., 120 F.3d 1181, 1189 (11th Cir. 1997).* The Eleventh Circuit has found direct evidence where "actions or statements of an employer relect[] a discrimination or retaliatory attitude correlating to the discrimination or retaliation complained of by the employee." *Id. (quoting Caban-wheeler v. Elsea, 904 F. 2d 1549, 1555 (11th Cir. 1990)).* "For statements of discriminatory intent to constitute direct evidence of discrimination, they must be made by a person involved in the challenged decision." *Id. (quoting Trotter v. Board of Trustees, 91 F. 3d 1449, 1453-54 (11th Cir. 1996)).*

Although Dr. Fason was involved in the challenged decision, he did not make the final decision. As a result, his statement is not "evidence which, if believed, would prove the existence of discrimination without interference or presumption." *Holifield, 115F.3d at 1561 (quoting Carter, 870 F2d at 581-82).* One must make an inference or presumption to conclude that Mr. Cover did not choose Plaintiff because Dr. Fason told Plaintiff he was "too old for the position." While Plaintiff is entitled to the benefit of all inferences at this stage the proceeding, still there has to be some evidence that Dr. Fason's statement was conveyed to the decision-maker for Plaintiff to obtain the benefit of an inference that the adverse employment action was based on an improper consideration.

Although neither party addressed this issue, Dr. Fason's statements raise what is called in Eleventh Circuit Title VII jurisprudence the "cat's paw' theory." As a general proposition, an adverse employment decision may be actionable if an employee proves that the recommendation directly resulted in the adverse employment action. See *Zaklama v. Mt. Sinai Medical Center, 824 F. 2d 291, 294 (11th Cir. 1988).* However, as the Eleventh Circuit has explained, this causation must be truly direct. The plaintiff must prove that the discriminatory animus behind the recommendation was the actual cause of the decision - maker's employment action. *Llampallas v. Mini-Circuits, lab., Inc., 163 F.3d 1236, 1248 (11th Cir. 1998).* One way of proving that the discriminatory animus behind the recommendation cause the adverse employment decision is under the so-called " cat's paw" theory. this theory provides that causation may be established if the plaintiff shows that the decision-maker followed the biased recommendation without conducting an independent investigation. In such a case, the recommender is using the decision-maker as a mere conduit, or "cat's paw," to give effect to the recommender's discriminatory animus. *Id.* at 1249.

There is no such evidence in this case. The evidence is not disputed that Mr. Cover conducted an independent. In addition to receiving Dr. Fason's and Ms. DuPree's recommendation, he reviewed all the candidate. He expressly has stated his reasons for selecting Ms. Dennard over Plaintiff, none of which supports a reliance on Dr. Fason's alleged discriminatory animus. Therefore, there is no evidence that could reasonably indicate that Dr. Fason's allegedly discriminatory animus influenced Mr. Cover's decision not to offer Plaintiff the position in question. *Stimpson v. City of Tuscaloosa, 186 F. 3d 1328, 1332 (11th Cir. 1999).*

The case, then, must be analyzed pursuant to the Mc Donnell Douglas / Burdine burden - shifting paradigm for employment discrimination cases based on circumstantial evidence. As explained above in regard to Plaintiff's Title VII retaliation claim, a plaintiff in an ADEA case generally must first establish a prima facie case. If he does so, the defendant then must rebut the raised presumption of discrimination by articulating a legitimate, non-discriminatory reason for its decision. If the defendant does so, the burden then shifts back to the plaintiff to show that the defendant's stated reason is pretextual.

Defendant concedes for purpose of the summary judgment motion that plaintiff can establish a prima facie case of age discrimination. A burden of production, therefore, shifts to Defendant to articulate a legitimate, non-discriminatory reason for ifs decision not select him for the executive director position in 2002.[9] In response to this burden, Defendant has explained that Mr. Cover "selected Dennard because he believed she would perform well in the position... He did not believe Plaintiff would perform well in the position because he did [not] have much experience.' ("Defendant's Brief in Support of Its Motion for Summary Judgment." p.27) (citing Cover aff., ¶ 8). Mr. Cover has testified more specifically in his affidavit as follows:

I hired Collette Dennard. She was the most qualified for the position and I felt she would perform well in the position. Dennard demonstrated extensive experience and knowledge in the areas of current environmental laws, methods or project management, coordination of environmental research programming and facilitating community meetings'

I did not select Phillip Jones because I did not believe he would perform well in the position. Specifically, Plaintiff did not have much experience in the areas he claimed to have experience. For example, when asked by the selection committee to explain his experience in the areas of 1) conducting environmental research; 2) managing environmental projects; 3) facilitating community meetings and program budgeting, Jones repeatedly referred to his participating in " creating the Department of Environment," but he was not able to provide any examples of past work experience that would legitimately qualify his understanding and kownledge of the areas environmental research, project management, community meeting facilitation or program budgeting. Additionally, I was concerned with Jones' people skills and leadership skills.

(Cover aff., ¶¶ 8-9). This clearly satisfies Defendant's "exceedingly light" burden .

A burden of persuasion would then return to Plaintiff to establish (or at least shown a genuine issue of material fact as to whether) that explanation is pretexual. "Provided that the proffered reason is one that might motive a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply

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[9] Plaintiff also appears to allege that he was also not selected for two other positions based on his age at the same time he was not selected for this executive director position. Because both parties seem to consider the decision-making for all three positions to have been essentially consolidated, the undersigned will address all three at once by using the evidence that expressly relates to the executive director job.

quarreling with the wisdom of that reason." Chapman v. AI Transport, 229 F. 3d 1012, 1030 (11th Cir. 2000) (citing Alexander v. Fulton County, 207 F.3d 1303, 1341 (11th Cir. 2000)). Plaintiff, however, has not done that. He has not directed the Court to any evidence indicating that Mr. Cover's specific assertions are not accurate. The only evidence the undersigned finds in the record that might even arguably point to pretext is Dr. Fason's alleged statement about Plaintiff's age, but again, the statement by Dr. Fason, in the absence of further evidence, does not contradict the specific reasons given by Mr. Cover for his decision.

Accordingly, the undersigned Magistrate Judge finds that there is no genuine issue of material fact to be tried and that Defendant is entitled to judgment as a matter of law as to ADEA age discrimination claim. The undersigned therefore **RECOMMENDS** that Defendant's summary judgment motion be **GRANTED** as to that claim.

The Clerk of Court is **DIRECTED** to withdraw the reference to the undersigned Magistrate Judge.

IT IS SO RECOMMENDED and **DIRECTED**, this the 31st day of March, 2004.

ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE

WARRANT NO. 03W00744

ALPHARETTA POLICE DEPARTMENT NO. 0212-0361

MUNICIPAL COURT OF ALPHARETTA, GEORGIA

GEORGIA, FULTON COUNTY STATE OF GEORGIA

VS.

MUSTAFA BEY
Accused

AFFIDAVIT

Personally appeared the undersigned prosecutor, Phillip A. Jones who on oath says that, to the best of his knowledge and belief, the above-stated accused, between the hours of 1200 p.m. on the 18th day of December and 1300 p.m., on the 18th day of December 2002, did commit the offense of Simple Battery in violation of O.C.G.A. 16-5-23 at 301 South Main St., Alpharetta, Georgia 30004, City of Alpharetta, Fulton County, Georgia, and against Phillip A. Jones and the laws of the State of Georgia. The facts upon which this affidavit for arrest are based as follows:

While at a farewell party of a fellow employee the suspect Mr. Bey came up behind him, grabbed his arms and pulled them behind his back with force with intent to harm. and prosecutor makes this affidavit that a warrant may be issued for the accused's arrest.

Sworn and subscribed before me this 8th day of August, 2003. Phillip A. Jones Before Rita Combs Notary Municipal Court of Alpharetta.

STATE WARRANT FOR ARREST

To any sheriff, Deputy sheriff, Coroner, Constable or Marshal of this State - Greetings: For sufficient cause made known to me in the above affidavit, incorporated by reference herein, and other sworn testimony, you are hereby commanded to arrest the accused, Mustafa Bey named in the above affidavit, charged by the prosecutor therein with the above offense against the laws of this State at the time, place and manner named in the above affidavit, and bring the accused before me or some other judicial Officer of this State to be dealt with as the law directs. Herein fail not,

This 8th day of August 2003.

Judge, Municipal Court of Alpharetta

ORDER FOR BOND

IT IS ORDERED that the aforesaid accused, Mustafa Bey be and he is hereby granted bail to be made with sufficient surety in the amount of Fifteen Hundred * (day sign own Bond) Dollars ($1,500.00) to assure the presence of said accused at his arraignment, trail and final disposition in the assigned Court of Fulton County, Georgia.

Witness my hand and seal, this 8th day of August 2003. *Def. no Contact w/ Mr. Jones.

Judge, Municipal Court of Alpharetta

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP A. JONES SR.
Petitioner
v.
FULTON COUNTY GOVERNMENT
Respondent (s)

PROOF OF SERVICE

I, Phillip A. Jones Sr., do swear or declare that on this date, April 30, 2005, as required by Supreme Court Rule 29, I served the enclosed PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or delivery to a third-party commercial carrier for delivery within 3 calendar days.

Fulton County Attorrney
Rolesia Butler Dancy, Senior Attorney
141 Pryor Street S.W., Suite 4001
Atlanta, Georgia 30303

I declare under penalty of perjury that the foregoing is true and correct.

Phillip A. Jones Sr.
Pro Se Counsel